No. 15,480

IN THE

United States Court of Appeals

For the Ninth Circuit

J. C. MILLETT CO., a corporation doing business as Key Distributing Co.,
Appellant,

vs.

DISTILLERS DISTRIBUTING CORPORATION,
Appellee.

Appeal from the United States District Court for the Northern District of California, Southern Division.

APPELLANT'S CLOSING BRIEF.

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FOREWORD.

The within closing Brief of Appellant follows as closely as possible the Argument in Paragraph III and Citations contained in Paragraph IV Appellee's Brief, in the order and under the caption they appear in that Brief; only the paragraph numbers differ. "A. B." indicates "Appellee's Brief" followed by the page number in which the quotations appear therein.

ARGUMENT.

A. FIRST CAUSE OF ACTION.

Appellee's concluding statement as to the First Cause of Action (A.B. p. 9) reads as follows:

> "It is respectfully submitted that as the record in this case contains no evidence that Calvert, as alleged in plaintiff's first cause of action, obligated itself to cause its salesmen to solicit orders from retailers located in Alameda and Contra Costa counties and submit all such orders to plaintiff for delivery, the trial court correctly ruled in denying plaintiff relief on its first cause of action, which relief was sought by reason of an alleged breach of said obligation."

The record does NOT support that conclusion; it shows that Calvert did obligate itself to "promote the sale of its products" (par. 6, Exhibit 1; Appendix to Appellant's Opening Brief, page iv). The evidence shows just how this was done: Franklin Lewis, formerly employed as one of the "specialty men" by defendant during the effective period of the contract between the parties, testified as follows:

> "Q. What if anything was said with regard to promotions by you in your work in the Key Distributing branch of the plaintiff?
>
> A. I was told specifically—there was another man involved in this, too. We were both told to withdraw all support to Key Distributing Company and not even to put—this isn't a direct quote, but this is as close as I can remember—not even to put our foot in the door." (Tr. pages 129-130.)

"Q. After you were so directed by Mr. Garfield, and either Mr. Taube or Mr. Garfield in Mr. Taube's presence, did you then give any assistance to Key Distributing branch of the plaintiff?

A. None whatever.

Q. In the event a retailer appeared in need or expressed a desire to purchase Calvert products, what if anything were you instructed to say to him in that connection?

A. Well merely—I mean, it's a trick of the trade. It's a way to emphasize one and de-emphasize the other, and over the years you know how to do that.

* * *

Q. And after that time, in the month of June or July 1952, until the end of the year did you go to the Key Distributing branch of plaintiff in connection with your work for Calvert?

A. As everything else at Calvert, they signed the check. I did what they told me to do. I don't think I even walked inside the door.

Q. And you gave no help whatever?

A. None whatever." (Tr. pages 129-131.)

It is plain that whether or not plaintiff is entitled to any recovery on the First Cause of Action depends on: (1) what defendants actually agreed to do in the written agreement to help sales with promotion and advertising; and (2) what they actually did or *failed to do* under that agreement. And on this theory the trial Court was in error.

B. SECOND CAUSE OF ACTION.

Appellee's concluding statement as to the Second Cause of Action (A.B. p. 13) reads as follows:

> "It is clear from the record that plaintiff's order of December 15, 1952, would have resulted in 'an excessive inventory' in plaintiff's hands within the meaning of the provisions of paragraph 5 of the contract, and that accordingly as determined by the trial Court defendant had legal justification for refusing to fill said order."

The facts and figures relating to the Second Cause of Action have been stated fully in Appellant's Opening Brief, pages 15-19, and will not be repeated here.

The point Appellant wishes to make in this connection, however, is that Appellee's theory is based on the assumption that the contract between the parties automatically terminated December 31st, 1952, which is not *conceded.* In this connection it should be noted particularly that, under the provisions of paragraph 11 of the written agreement plaintiff gave written notice to the defendant that plaintiff has elected to exercise the option to extend the agreement on November 18, 1952 (see exhibit 3 to complaint) and the written order relating to the 900 cases which defendant failed to ship was dated December 15, 1952. If it develops that plaintiff was entitled to exercise that option, this 900 case order was essential to the continuity of the distributorship, and should be considered in relation to the Second Cause of Action, in addition to all other factors.

C. THIRD CAUSE OF ACTION.

Appellee's concluding statement as to the Third Cause of Action (A.B. p. 20) reads as follows:

> ". . . Defendant agrees that irrevocable offers may be addressed to the desire, wish, election and choice of the offeree and that a contract comes into being upon the communication of the acceptance of an offer. However, defendant fails to see how these abstract propositions of law aid plaintiff's position. Defendant submits that the only question to be decided is whether the trial Court was correct in its decision that the provisions of paragraph 11 of the contract did not give plaintiff an option to renew the contract, and further submits that said question must be answered in the affirmative based on the *literal wording* of paragraph 11." (Emphasis added.)

The authorities supporting Appellant's position with respect to the Third Cause of Action are fully stated in the Appellant's Opening Brief at pages 54-74 and, with two minor exceptions will not be repeated here.

Par. 11 of the written agreement between the parties (Exhibit 1 attached to the complaint; Appendix, Appellant's Opening Brief, page v) reads as follows:

> "This contract shall be effective for a period of ten months from March 1, 1952. If Distributor desires to renew the contract, he shall so notify CALVERT not less than 30 days before December 31st, 1952."

It should be pointed out at the outset that there is no other provision in the written agreement relating to or in any way connected with the renewal provision and, to adopt Appellee's phraseology, the answer must be found in the "literal wording" of the above provision rather than *outside* of it. With this thought in mind we ask in all earnestness: (1) How would the average business man, such as the plaintiff here, have the right to interpret the phrase "If Distributor desires to renew the contract, he shall so notify CALVERT not less than 30 days before December 31st, 1952"? (2) How did the defendant *think* that provision would be interpreted when it inserted it in the agreement it prepared? (3) If defendant had in mind an unstated qualification when that provision was inserted in the agreement, or an interpretation which was not justified by the wording of it, why didn't defendant communicate such qualification or interpretation to the plaintiff at the time or before the agreement was executed?

Professor *Williston* provides the answer in his *Work on Contracts,* 4th edition, Section 1027-A which reads in part:

> "* * * Nor must it be overlooked that these elaborate instruments are almost invariably drawn by or on behalf of the manufacturer and presented to the dealer simply for his signature on the dotted line. The very fact that so frequently this carefully drawn instrument leaves the question of its termination, 'an obligation incompletely expressed,' and the startling disproportionate burden otherwise cast upon the dealer should here,

as in the requirement and output contracts, justify the courts in inferring an intention to bind both parties for at least such time as may be required to demonstrate the cause * * *."

AS TO THE DEFENSE OF ILLEGALITY OF THE CONTRACT.

A. RELEVANT PORTION OF THE CONTRACT AS IT READS.

Paragraph 6 of the written contract between the parties, dated March 14th, 1952, which is marked "Exhibit 1" and attached to the original complaint (Appendix, Appellant's Opening Brief, page iv), reads as follows:

"6. CALVERT agrees to promote the sale of its products and to advertise its products in a manner consistent with the type of merchandise and the cases sold. CALVERT shall have the sole right to determine the amount of sales promotion and advertising and the media used for advertising."

B. RELEVANT EVIDENCE OF WHAT ACTUALLY HAPPENED.

The testimony of Franklin Lewis, called for the plaintiff, shows that he was a former employee of defendants and worked for them from February 1947 until October 14, 1956 (Tr. p. 113) which included the period covered by the contract between plaintiff and defendants, i.e. from March 1, 1952 until December 31st, 1952. That testimony reads in part, and so far as material to illustrate the point here made, as follows:

"Q. Will you tell us briefly what you did in conjunction with your work for your employer, Calvert, in dealing with the Key Distributing branch of the plaintiff?

A. My work consisted of promoting the sale of Calvert merchandise by placing point of sale material; showing our newspaper, magazine, billboard and card programs; to tell the Calvert story." (Tr. page 117.)

* * *

"Q. Now, in your independent calls on retailers what happened, if it did happen, when the retailers needed some further Calvert products to complete his stock or, if he didn't have any, to install the item in his place? What would you do if you found that situation?

A. You mean what I did leading up to the actual sale, *which I cannot write?* (Emphasis added.)

Q. That is right.

A. Allowing that there was any appreciable quantity, contact the wholesaler specified by the retailer, and *he would consummate the sale if possible,* either with the help of a specialty man or by himself." (Tr. page 124.)

C. CHARGING ALLEGATIONS IN ORIGINAL COMPLAINT.

Paragraphs VII and IX of the First Cause of Action of the complaint originally filed *alleged,* briefly, in par. VII (Tr. page 6) that defendants have employed specialty men and directed and required them to call upon customers of the distributor in purported

support of the sale of defendants' products . . . and have submitted the orders so solicited and obtained to defendants' said distributors for delivery thereof. Par. IX (Tr. pages 7-8) *alleged* briefly that one of the conditions of the said written agreement was that the defendants agreed to promote the sale of its products by continuing to employ salesmen sometimes known as "specialty men" . . . and submit the orders so solicited and obtained . . . to the Key Distributing Co. for delivery.

D. COMMENT.

It is clearly apparent that counsel for Appellee is trying to determine the legality of the contract in this case by the *charging allegations* in the complaint rather than by (1) the contract as it was prepared by the defendant itself (see Tr. p. 78) and (2) by what the evidence shows was actually done under that provision of the contract. For the sake of brevity, and since Appellee has cited no authorities to show that this can be done, no authorities will be given here to show that such a theory is not, and cannot, be supported by any known rule of law.

E. PROPOSED AMENDMENTS TO COMPLAINT TO CONFORM TO PROOF.

Par. IX of the Amended Complaint offered to be filed, which appears on Tr. pp. 31-32, reads in part as follows:

"One of the provisions of the said written agreement, in par. 6 thereof, specified as follows:

> Calvert agrees to promote the sales of its products and to advertise its products in a manner consistent with the type of merchandise and the cases sold. * * *

Said provision was intended to, and did operate for the joint benefit of plaintiff and defendants in this, that it enabled plaintiff to make a substantial number of sales of defendants' products to plaintiff's customers. Pursuant to the said provisions the defendants did maintain such specialty men to promote sales and advertise its products in the counties of Alameda and Contra Costa wherein the said written agreement was operative. * * * "

F. ASSUMING, WITHOUT CONCEDING, THERE WAS A VIOLATION.

As already pointed out in the preceding comment, neither the contract, as written up by defendant, nor the evidence of how the provisions relating to the plan of promotion therein described, violate any cited or any known law, rules or regulations. However, assuming for the purpose of this discussion only, without conceding, that the provisions of par. 6 of the contract cited above was in violation of any existing law or regulation, where would that lead to?

> "Where a contract has several distinct objects, of which at least one is lawful, and one at least is unlawful, the contract is void as to the latter and valid as to the former."
>
> Sec. 1599 *Civil Code of California.*

> "A bargain that is illegal only because of a promise or provision for a condition, disregard of which will not defeat the primary purpose of the bargain, can be enforced with the omission of the illegal portion by a party to the bargain who is not guilty of serious moral turpitude unless this result is prohibited by statute. Recovery is more readily allowed where there has been part performance of the legal portion of the bargain."
>
> *Restatement of the Law of Contracts,* sec. 603, page 1119.

The written agreement, which is appended to the original complaint and marked Exhibit 1, shows that the objects and considerations for the agreement included—in the order in which they appear in that agreement:

1. Appointment by Calvert of Millett as distributor;

2. Acceptance by Millett from Calvert of the distributorship;

3. Maintenance of established prices;

4. Manner of invoicing and payment;

5. Manner of shipping by Calvert to Millett;

6. Agreement by Calvert to "promote sale of its product";

7. Agreement by distributor to maintain adequate sales force;

8. Agreement by distributor to maintain adequate inventory;

9. Agreement by distributor not to undertake additional competing lines;

10. Agreement as to prices to be charged and paid for;

11. Provisions relating to renewal of the agreement;

12. Provisions applicable if agreement not renewed;

13. Provisions as to waiver of partial non-compliance;

14. Provisions relating to change in ownership.

In interpreting a similar distributorship contract, the Court stated:

> "The distributorship contract in the case at bar is more than a contract of employment or agency. It is also a contract of sale. On the other hand, it is more than a mere sales contract. It partakes of the substantial aspects of both."
>
> *J. C. Millett Co. v. Park & Tilford,* 123 Fed. Supp. 484 at 492.

G. AUTHORITIES CITED BY APPELLEE NOT APPLICABLE HERE.

Section 23025 of the *Business and Professions Code* cited on page 22 of Appellee's Brief is not applicable because: (1) the words "Sell" or "Sale" or "to Sell" do not appear in the agreement as written; and (2) the evidence does not show any "Sale" was actually made under that agreement.

Appellee states (Appellee's Brief, page 23) that "a valid contract cannot be founded on an illegal consideration" and cites cases which purportedly support that statement. However, those cases do not remotely support that statement as shown below, and turned on entirely different facts not remotely resembling the facts in this case. Thus

King v. Johnson, 30 Cal. App. 63. This was an action to recover commission on the sale of real property. There was an agreement to subdivide the land before it was sold, but no map was ever filed nor any attempt made to comply with the provisions of Statutes of 1907 p. 290. Sec. 8 of that act prohibited the sale of land without prior compliance. Sec. 9 of that act expressly prohibited such a sale. The Court held the agreement invalid.

Losson v. Blodgett, 1 Cal. App. 2d 13. That case involved an agreement for the purchase and sale of land in Mexico. The constitution of Mexico prohibited defendants, as American citizens, from owning real property in the particular territory where the property was situated. The basis for the decision in that case is stated on page 18 of the text, where the Court said: "Plaintiff contracted to convey title to Mrs. Blodgett and this he could not legally do. If the consideration for a contract is unlawful, the contract is void."

Asher et al. v. Johnson, 26 Cal. App. 2d 403. That was an action by several plaintiffs to recover from the Board of Equalization sales taxes paid under protest

on income derived from the operation of gambling devices which were prohibited by law. The gist of the decision is stated on page 417 of the text which reads as follows: "For the reason that the funds upon which the levies of taxes were imposed were derived from illegal games of chance (instead of tangible personal property) we are of the opinion that the trial Court erroneously rendered judgment in favor of Respondents." (Board of Equalization.) (Matters in parenthesis added.)

Section 1608 of the *Civil Code* of the State of California, cited on page 23 of Appellee's Brief is not applicable in this case because: (1) there is no "single" consideration in this case for one or more of its objects; and (2) there are no several considerations for a "single" object. On the contrary, we have in this case at least 14 separate considerations and at least 14 separate and distinct objects to be accomplished under the written agreement.

Fewel & Dawes v. Pratt, 17 Cal. 2d 85. In that case defendant Pratt was a licensed insurance broker. He sold some life insurance policies to one Bullock. Later Bullock said to Pratt he would take additional policies if Pratt would divide his commission with Bullock's son-in-law, to which Pratt agreed. The son-in-law whose name was Fewel, was not licensed as an insurance broker. Fewel then formed a corporation who obtained a license as insurance broker and assigned his agreement with Pratt to the corporation. Pratt did not pay the commission to Fewel or the

corporation, and was sued on his obligations, and his defense was that the claim was in violation of Sec. 1714 of the Insurance Code, which provided that: "any person who shall act or offer to act or assume to act as a life insurance broker or agent, unless licensed by the insurance commissioner as provided in this section . . . shall be guilty of a misdemeanor."

The Supreme Court held (at page 90) that Fewel not only had no license at the time he entered into the contract with Pratt for a division of the commission, but never acquired one thereafter, and hence he was not entitled to recover direct or through an assignee.

Conte v. Busby, 115 Cal. App. 732. The gist of this case is stated on page 734 of the text in which the Appellate Court said: "The trial Court found that the indorsement by Busby of the draft was in consideration of and for the purpose of enabling her to conduct a house of prostitution, which is declared an unlawful act." Based on that finding, the Appellate Court held (at page 734) "The case is controlled by the general principle that where a part of a consideration for one or more objects is void the whole contract is void."

The significant fact in this case is that the original action included, besides the draft which was considered illegal, a cash item of $145.00 and the trial Court gave plaintiff judgment for the $145.00 only, which judgment was not disturbed on appeal.

CONCLUSION.

It is respectfully submitted that under the agreement as written, the facts and the evidence in this case, and the law applicable thereto, the Findings and the Judgment of the trial Court are erroneous. The judgment ought to be reversed as to all three causes of action in the complaint, with directions to allow the proposed Amended Complaint to Conform to Proof to be filed, proceed to take evidence on the question of damages which was reserved at the time of the trial, then enter judgment in favor of plaintiff and against defendant for such amount of damages on each of the three causes of action as the evidence may justify.

Dated, San Francisco, California,
August 14, 1957.

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Leon A. Blum,
By J. Albert Hutchinson,
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